86-320

No.

Supreme Court, U.S.
FILED
AUG 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROSS PROCK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Does federal jurisdiction exist for a criminal prosecution under Title 18, United States Code, Section 1010 (1982), the Mobile Home Loan Program of the Federal Housing Administration where the prosecution showed no connection between the Federal Housing Administration and the mobile home loans procured by the Petitioner.*

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*The caption in the case in the Court of Appeals listed Co-Defendants Marvin Jenkins and Rich White. Said Defendants have not sought a writ from this Court.

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No.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, ROSS PROCK, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on March 27, 1986, rehearing denied July 2, 1986.

STATEMENT OF THE CASE

Petitioner ROSS PROCK was a part-owner of Young American Mobile Home Sales, a Nevada business selling

mobile homes to low income purchasers. At trial the prosecution attempted to show that Young American Mobile Home Sales had altered manufacturer's invoices and had prepared false loan documents to enable unqualified purchasers to buy a home. The defense at trial was that the manufacturer's invoices were altered to provide for air conditioning for the mobile homes, as air conditioning is essential for the hot desert climate of Las Vegas. The loan documents were not submitted to the FHA. The loan documents were submitted to Sherwood & Roberts, Inc., a financial institution which provided loans for the purchase of mobile homes.

Certain Sherwood & Roberts, Inc., employees required the owners of Young American Mobile Home Sales, to pay them "bird-dog" fees, which were kickbacks for obtaining loans for the mobile home purchasers.

Under these circumstances, the profits to Young American Mobile Home Sales were limited, and Young American Mobile Home Sales went out of business. RICK WHITE, two years before the collapse of Young American Mobile Home Sales, had walked away from the dealership and lost his original part-ownership investment.

The prosecution contended that some of the low-income purchasers could not make the required minimum cash down payment. Some of these buyers defaulted on their loans. However, the FHA did not repay the loans in default. The default loans never reached the FHA because the lending institution, Sherwood & Roberts, Inc., stopped the loans before they were submitted to the FHA. Young American Mobile Homes had to absorb the losses.

On or about August 3, 1983, the Grand Jury handed down an indictment charging Petitioner and the Co-Defendants with One Count of Conspiracy to Defraud the

Government and Thirteen Counts of Violations of 18 U.S.C. §1010. The conspiracy count alleged that from June, 1978, to January 18, 1980, Petitioner and the Co-Defendants conspired to submit various false documents to an FHA approved lender in order to obtain a federally insured loan. The loan documents concerned purchases of mobile homes from Petitioner and Co-Defendants' dealership and were allegedly accompanied by secret payments to induce the lender, "to close [its] eyes to the credit worthiness of the purchases and . . . the existence of short cash down payments." The thirteen substantive counts related that Petitioner and the Co-Defendants falsely certified on FHA forms that manufacturer's invoices submitted in connection with the loan applications were true and correct.

A superseding Indictment handed down on August 24, 1983, changed the beignning of the alleged conspiracy from June, 1978, to the fall of 1978 and amended the overt acts which allegedly furthered the purpose of the conspiracy.

Trial in this case commenced on May 2, 1984, and continued until May 16, 1984. During the course of the trial, the Government introduced approximately 150 exhibits such as copies of retail installment contracts and placement certificates and put 26 witnesses on the stand. Defense counsel, in turn, introduced its own exhibits, mostly portions of previously taken depositions to test the credibility of the Government's witnesses.

At the close of the Government's case, Petitioner, as well as the Co-Defendants, brought Motions for Judgment of Acquittal pursuant to Federal Rule of Criminal Procedure 29(a) on the grounds of insufficiency of the evidence. Defense counsel claimed *inter alia* that the Government had failed to prove that a contract of in-

surance existed between the lender and the FHA; that there was no proof that any of the Defendants had signed the allegedly falsified placement certificates; and that Defendants did not have the requisite intent to defraud the Government. After taking Defendants' arguments under submission, the District Judge granted Defendants' Motion as to Counts II through VIII, XII and XIV with respect to Petitioner and Defendant JENKINS and Counts II through XIV with respect to Defendant WHITE. The District Judge refused to dismiss Counts IX, X, XI and XIII with respect to Petitioner and Defendant JENKINS on the grounds that the Jury could arguably find that the signatures on exhibits 39-D, 38-D, 37-D and 41-D were those of Petitioner or Defendant JENKINS.

Defendants renewed their Motions for Judgment of Acquittal after submission of the case to the Jury, pursuant to Federal Rules of Criminal Procedure 29(b), but the District Judge summarily denied the same.

On May 16, 1984, the Jury rendered its verdict as to each Defendant. The Jury found Petitioner guilty as charged in Counts I, IX, X, XI and XIII; Defendant JENKINS guilty as charged in Counts I and II; and Defendant WHITE guilty as charged in Count I. The District Judge formally entered Judgment and scheduled sentencing for the following month.

On August 29, 1984, Petitioner and the Co-defendants appeared before the District Judge in Honolulu, Hawaii. At that time, Petitioner was given the sentence of three (3) months imprisonment, five (5) years probation, and a fine of Three Thousand ($3,000.00) Dollars with respect to Count I and five (5) years probation and a fine of Four Thousand ($4,000.00) Dollars with respect to Counts IX, X, XI and XIII.

The Ninth Circuit Court of Appeals entered its decision upholding the conviction and holding that 18 U.S.C. §1010 did not require proof of government insurance as an element of the crime.

REASONS FOR GRANTING THE WRIT

This is a case of exceptional importance because it has judicially expanded liability into an area never intended by Congress and into an area where federal jurisdiction is lacking. Furthermore, the decision in this case creates a conflict in decisions among the circuits where there was none before.

The decision in the case at bar held that since Title 18, United States Code, Section 1010 is composed of several operative clauses written in the disjunctive, then false statements made in several different contexts can trigger its application.

The decision concluded that proof of government insurance is not an element of this offense.

The court's reasoning was that the indictment charged Petitioner with violating the first prohibition of Section 1010, that of false statements "for the purpose of obtaining that the loan or advance of credit shall be offered to or accepted by (HUD) for insurance. . . ."

However, the decision is flawed because without a contract between the lending institution and the FHA, the essential hook for federal jurisdiction is missing. The existence of federal insurance is an essential element of a Section 1010 offense, without which the court lacks subject matter jurisdiction because Congress could not, and did not, create a federal crime without a federal jurisdictional base.

The Court of Appeals has impermissibly expanded federal jurisdiction to include a state matter. The decision pointed out: "This issue is one of first impression in this and all other circuits." Should other circuits follow this precedent, the federal courts will be encroaching on state prerogative.

The gist of the offense is the knowing submission of a false document to a financial institution in connection with obtaining an FHA loan. *Tripp v. United States*, 381 F.2d 320, 321 (9th Cir. 1967); *United States v. Bernstein*, 533 F.2d 775, 787 (2nd Cir. 1976).

Proof beyond a reasonable doubt of a contract of certificate of insurance is an essential element and is a jurisdictional prerequisite of federal prosecutions for robbing or defrauding federally insured institutions. See *United States v. Washburn*, 758 F.2d 1339 (9th Cir. 1985); *United States v. Bolt*, 776 F.2d 1463 (10th Cir. 1985); *United States v. Sliker*, 751 F.2d 477 (2nd Cir. 1984), *cert. denied*, ___ U.S. ____, 105 S.Ct. 1772, L.Ed.2d (1985); *United States v. Shively*, 715 F.2d 260 (7th Cir. 1983); *United States v. Knop*, 701 F.2d 670 (7th Cir. 1983), *cert. denied*, ___ U.S. ____, 104 S.Ct. 1001, 79 L.Ed.2d 233 (1984); *United States v. Platenburg*, 657 F.2d 797 (5th Cir. 1981); *United States v. Ford*, 641 F.2d 77 (4th Cir. 1981), *cert. denied*, 451 U.S. 17, 101 S.Ct. 1996, 68 L.Ed.2d 310 (1981); *United States v. Maner*, 611 F.2d 107, 112 (5th Cir. 1980).

The indictment in the case at bar alleged that there existed a contract of insurance between the FHA and Sherwood & Roberts, Inc., the lending institution which provided the mobile home loans for Young American Mobile Home Sales. However, nothing was offered at trial to

show any contract of insurance between the lending institution and the FHA.

As the decision in the case at bar has pointed out, the construction of Section 1010 is a case of first impression among the circuits. However, many courts have examined Title 18, United States Code, Section 1014, which parallels Section 1010 in the area of false statements.

In *United States v. Waechter,* 771 F.2d 974 (6th Cir. 1985) the court held that the evidence did not support a finding that any bid on behalf of Waechter asserted an express or implicit false statement to HUD. *Waechter* shows that placing bids in bad faith for HUD houses, and a method of bidding creating a false impression will not support a conviction under section 1010. Although his method of bidding may have been a fraudulent scheme, its execution did not involve making any false statements to HUD.

"We resolve this conflict in favor of Waechter because we construe section 1010 to require proof that the defendant made an assertion of fact to HUD, a statement that was subject to proof or disproof, and we find no evidence that his bidding method entailed making statements that violated section 1010," 771 F.2d at 977.

In construing the term false statement as used in section 1010 we are mindful of the thoroughly-established principle that the conduct prohibited by a criminal statute is to be narrowly construed. See *Dowling v. United States,* ____ U.S. ____, 105 S.Ct. 3127, 3132, 87 L.Ed.2d 152 (1985); *Williams v. United States,* 458 U.S. 279, 290, 102 S.Ct. 3088, 3094, 73 L.Ed.2d 767 (1982); *United States v. Cox,* 593 F.2d 46, 47, 49 (6th Cir. 1979); *Waechter, supra,* 771 F.2d at 978.

Proof of a contract of insurance is a necessary and jurisdictional element of prosecutions for violating or for conspiring to violate Title 18, United States Code, Section 1014. Section 1014 prohibits knowingly making "any false statement . . . for the purpose of influencing in any way . . . any bank the deposits of which are insured by the Federal Deposit Insurance Corporation . . ." See *United States v. Washburn, supra; United States v. Shively, supra; United States v. Knop,* 701 F.2d 670 (7th Cir. 1983); *United States v. Platenburg, supra.*

Also, *United States v. Bernstein,* 533 F.2d 775 (2nd Cir. 1976), citing *United States v. Leach,* 427 F.2d 1107 (1st Cir.), *cert. denied,* 400 U.S. 829, 91 S.Ct. 57, 27 L.Ed.2d 59 (1970) stated: "Conviction of the defendants under 18 U.S.C. § 1010 required proof of three elements: the making of a false statement in the FHA application, knowing it to be false for the purpose of influencing the FHA to issue mortgage insurance." 533 F.2d at 801.

Without proof of a contract of insurance, the prosecution failed to show that the FHA could have been influenced to issue mortgage insurance to Young American Mobile Homes Sales, through Sherwood & Roberts, Inc.

In *United States v. Shively, supra,* the Seventh Circuit, in reversing a conviction under Section 1014 on the grounds that the government failed to prove beyond a resonable doubt that the bank was federally insured when the false statement was made, said: ". . . you cannot infer from the fact that someone is required by law to do something that he has done it . . ." 715 F.2d at 265. In *Shively,* the only evidence of insured status that was introduced was a certificate of insurance that the FDIC had issued some years previously.

In the case at bar, the record contains no evidence of in-

sured status of Sherwood & Roberts, Inc., the lending institution.

The Fifth Circuit, exasperated by the failure of prosecutors to establish proof of federally insured status, held, in *United States v. Platenburg, supra,* that:

> "We again address the question of the quantum of evidence required to establish, in a criminal case, that the financial institution involved is insured by the FDIC. Proof of this status is not a mere formality; it is an essential element of the federal offense charged in the case before us. Indeed, federal jurisdiction depends on this status. *United States v. Murrah,* 478 F.2d 762 (5th Cir. 1973). The government must prove beyond a reasonable doubt that the Liberty Bank and Trust Company was insured by the FDIC in 1979 when the charged criminal acts occurred."
>
> 657 F.2d at 799.

Again, in 1983, the Fifth Circuit held that the jurisdictional requirements discussed in *Platenburg, supra,* were "analogous" to the extent that proof that a bank is federally insured is "both a jurisdictional predicate *and* a substantive element" of the offense under the statue construed there. *United States v. Trevino,* 720 F.2d 395, 398 (5th Cir. 1983). Proof of the insured status of the bank involved is an essential element of the crime charged. 720 F.2d at 399.

The other area of concern in the construction of Section 1010 is whether a crime was charged. The plan, as put into effect by Young American Mobile Home Sales and Sherwood & Roberts, Inc., did not involve making any false statements to the FHA. The altered invoices and inflated loan applications were stopped by the employees of Sherwood & Roberts, Inc., who were accepting what they called "bird-dog" fees. FHA paid out no monies in insurance

because none of the defaulted mobile home loans were submitted to the FHA for payment, during the time period that RICK WHITE worked for Young American Mobile Home Sales.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals required no federal nexus be found. The holding of the Court is that proof of federal jurisdiction is not an essential element of the crime.

Respectfully submitted,

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August 28, 1986

APPENDIX

UNITED STATES v. JENKINS
Cite as 785 F.2d 1387 (9th Cir. 1986)

UNITED STATES of America,
Plaintiff-Appellee,

v.

Marvin JENKINS, Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Ross PROCK, Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Rich WHITE, Defendant-Appellant.

Nos. 84-1267, 84-1268 and 84-1281.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 14, 1985.
Decided March 27, 1986.

Defendants were convicted in the United States District Court for the District of Nevada, Harold M. Fong, Chief Judge, of conspiring to defraud government by making false statements to obtain loans insured by the Federal Housing Administration, and second defendant was convicted of four false statements counts. They appealed. The Court of Appeals, Canby, Circuit Judge, held that:

(1) provision of statute prohibiting false statements for purpose of obtaining loan or advance of credit with intent that loan or advance of credit shall be offered to or accepted by the Department of Housing and Urban Development for insurance does not require proof of government insurance as element of offense; (2) to the extent that indictment included allegations that defendants' false statements were directed to an FHA-approved lender, allegations were surplusage which did not have to be proved at trial, since inclusion of such surplusage did not prejudice defendants; (3) third defendant failed to establish that he was entitled to severance; and (4) evidence was sufficient to support defendants' convictions.

Affirmed.

Fraud 68.10(1)

Provision of statute, 18 U.S.C.A. § 1010, prohibiting false statements for purpose of obtaining loan or advance of credit with intent that loan or advance of credit shall be offered to or accepted by the Department of Housing and Urban Development for insurance does not require proof of government insurance as element of offense.

2. Fraud 68.10(1)

Government insurance was not required to be proved in order to support federal subject matter jurisdiction over prosecution of defendant for violating 18 U.S.C.A. § 1010, which prohibits making false statements in loan transactions involving the Department of Housing and Urban Development, in light of Congress' plenary power to regulate interstate commerce and thus, district court had jurisdiction over prosecution under 18 U.S.C.A. § 3231.

3. Indictment and Information 71.2(1)

Indictment must provide defendant with description of charges against him sufficient to enable him to prepare his defense, to ensure that he is being prosecuted on basis of facts presented to grand jury, to enable him to plead double jeopardy against later prosecution, and to inform court of facts alleged so that it can determine sufficiency of charge.

4. Indictment and Information 166

Government need not prove all facts charged in indictment; instead, only enough facts to prove essential elements of the crime must be demonstrated at trial.

5. Indictment and Information 167

Insofar as language of indictment goes beyond alleging elements of crime, it is mere surplusage that need not be proved.

6. Indictment and Information 119

Inclusion of surplusage in indictment must not be allowed to prejudice defendant in context of his case.

7. Indictment and Information 167

To extent that indictment included allegations that defendants' false statements were directed to a Federal Housing Administration-approved lender, allegations were surplusage going beyond elements of violation of 18 U.S.C.A. § 1010, which prohibits making false statements in loan transactions involving the Department of Housing and Urban Development, and such allegations did not have to be proved at trial, since inclusion of such surplusage did not prejudice defendants.

8. Witnesses 307

The Fifth Amendment privilege against self-incrimination is not ordinarily self-executing and must be affirmatively claimed by person whenever self-incrimination is threatened. U.S.C.A. Const.Amend. 5.

9. Witnesses 305(1)

Individual may lose benefit of privilege of self-incrimination inadvertently, without a knowing and intelligent waiver. U.S.C.A. Const.Amend. 5.

10. Criminal Law 406(4)
Witnesses 305(2)

Defendant, by admitting in deposition testimony in civil action that financing arrangements constituted "federal fraud," waived his privilege against self-incrimination, and waiver was voluntary, even though defendant was subpoenaed to appear, so that defendant's statements at deposition were admissible against him as party admissions under Rule 801(d)(2)(A). U.S.C.A. Const.Amend. 5; Fed.Rule Evid. Rule 801(d)(2)(A), 28 U.S.C.A.

11. Witnesses 305(1), 307

Obligation to appear and testify truthfully does not constitute compulsion to give incriminating testimony; privilege against self-incrimination may still be asserted at proceeding and must be to avoid waiver of privilege. U.S.C.A. Const.Amend. 5.

12. Criminal Law 662.30

First defendant's testimony at deposition in civil action admitting that financing arrangements constituted "federal fraud" did not directly implicate second defendant,

but only tended to obliquely implicate second defendant in context of other evidence of guilt, so that admission of such deposition testimony did not violate second defendant's Sixth Amendment right of confrontation, despite first defendant's failure to testify. U.S.C.A Const.Amend. 6.

13. Criminal Law 622.2(10)

When reason for severance is need for codefendant's testimony, defendant must show that he would call codefendant at severed trial, that codefendant would in fact testify, and that testimony would be favorable to moving party.

14. Criminal Law 622.3

Defendant, who made bare assertion that codefendant's testimony would have been favorable if codefendant had testified at separate trial, but who stated in original severance motion that codefendant's grand jury testimony actually implicated defendant, failed to establish that codefendant's testimony would have necessarily been favorable to defendant so as to require severance.

15. Criminal Law 1166(6)

Defendant's assertion that he was minor player in fraudulent scheme was insufficient to establish that defendant's conviction resulted from spillover effect from evidence against codefendant, and thus, he failed to establish that he was entitled to reversal on basis of denial of motion for severance, where trial judge carefully gave several cautionary and limiting instructions to ensure that jury could compartmentalize evidence.

16. Criminal Law 414

Motions to suppress statements on Fifth amendment voluntariness grounds deserve fair hearing and reliable determination, but such requirement applies only if substantial facts are in dispute. U.S.C.A. Const.Amend. 5.

17. Witnesess 305(2)

Defendant, by failing to assert Fifth Amendment privilege during grand jury proceedings, waived such rights, where letter he received from government attorney, although indicating that defendant was not putative defendant, also clearly stated that he was subject of investigation and that he could become target of investigation at any time, and where letter detailed defendant's right to refuse to answer incriminating questions and to retain counsel. U.S.C.A. Const.Amend. 5.

18. Criminal Law 1169.1(5)

Use of incomplete signature exemplar by jury in making handwriting comparisons to various Federal Housing Authority loan documents allegedly containing fraudulent statements was not an "extreme or unusual circumstance" requiring reversal, where defendant offered no evidence to rebut authenticity of signatures.

19. Criminal Law 369.2(1), 371(1)

Evidence that defendant used fraudulent means to secure conventional loans was admissible under Rule 404(b), as probative on issues of intent, knowledge, good faith and absence of mistake in dealing with charge that defendant obtain by fraudulent means financing insured by the Federal Housing Authority, 18 U.S.C.A. § 1010,

and district court did not abuse its discretion in admitting such evidence on basis of its determination that probative value was not outweighed by prejudice. Fed.Rules Evid. Rules 403, 404(b), 28 U.S.C.A.

20. Criminal Law 847

Defendant waived request for curative instruction as to evidence of prior conduct of one defendant, even though curative instruction only applied to other defendants, where defendant did not object to curative instruction given following testimony or to absence of instruction as part of jury charge.

21. Fraud 69(5)

Evidence was sufficient to support defendants' convictions of conspiring to defraud government by making false statements to obtain loans insured by the Federal Housing Authority, and one defendant's conviction of four counts of making false statements to obtain loans insured by the FHA. 18 U.S.C.A. §§ 371, 1010.

Barbara A. Corprew, U.S. Dept. of Justice, Washington, D.C., for plaintiff-appellee.

Thomas F. Pitaro, John P. Fadgen, Patrick C. Clary, Lorraine Mansfield, Las Vegas, Nev., for defendants-appellants.

Appeal from the United States District Court for the District of Nevada.

Before GOODWIN, NELSON and CANBY, Circuit Judges.

CANBY, Circuit Judge:

This case arises form a scheme to obtain by fraudulent means financing insured by the Federal Housing Administration (FHA) under the Title 1 Mobile Home Loan Program. The government alleged that, by altering and inflating manufacturer invoices and by bribing employees of Sherwood & Roberts (S & R), an FHA-insured lender, appellants Marvin Jenkins, Ross Prock and Rick White sought to obtain government insured financing for mobile homes they were selling through Young American Mobile Home Sales of Las Vegas, Nevada. Appellants were stockholders, officers and employees of Young American.

The bribes, in the form of kickbacks of several hundred dollars for each loan processed, were intended to facilitate easy loan approval by S & R. By altering manufacturer invoices, Young American could secure for its customers insured financing for "extras" not normally permitted under Title 1 guidelines.

Appellants were tried on an indictment that charged thirteen counts of making false statements to obtain loans insured by the FHA, 18 U.S.C. § 1010 (1982), and one count of conspiring to defraud the government by such

statements, 18 U.S.C. § 371 (1982). A jury found all three guilty of conspiracy and Prock guilty on four false-statements counts. They appeal on various grounds. We affirm.

I. PROOF OF FEDERAL INSURANCE

Appellants contend that their convictions should be reversed because the government failed to prove the existence of a contract of insurance between S & R and the FHA, as alleged in the indictment. The existence of federal insurance, they argue, is an essential element of a Section 1010 offense (or conspiracy to violate Section 1010), without which the trial court lacks subject matter jurisdiction. The issue is one of first impression in this and all other circuits.

A. *Construction of Section 1010*

Section 1010[1] prohibits making false statements in loan transactions involving the Department of Housing and

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[1] 18 U.S.C. § 1010 provides:

> Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnershipo, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Department of Housing and Urban Development for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Department, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Department, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Urban Development (HUD). The statute is invoked here because FHA is a HUD agency.

Appellants contend that the language of Section 1010 mirrors that of 18 U.S.C. § 1014, which punishes false statements to "any bank the deposits of which are insured by the Federal Deposit Insurance Corporation. . . ." Because proof of FDIC insurance is an essential element of a Section 1014 charge, *see United States v. Platenburg,* 657 F.2d 797, 799 (5th Cir.1981), appellants argue that, by parallel reasoning, proof of insurance should also be an element of a Section 1010 charge. The existence of federal insurance, they argue, is what makes the offense a federal one.

The government disagrees. It argues that, while direct proof of FHA insurance is relevant, it has never been held necessary to a Section 1010 violation. The cases cited by the government, however, are not conclusive. Most of the cited cases deal with the ephemeral issue of intent in these cases; while they do not hold proof of insurance to be an element of a Section 1010 violation, they do not reject it as one either. *See, e.g., United States v. Barbato,* 471 F.2d 918, 921-22 (1st Cir.1973); *United States v. Leach,* 427 F.2d 1107, 1111 (1st Cir.), *cert. denied,* 400 U.S. 829, 91 S.Ct. 57, 27 L.Ed.2d 59 (1970); *Brilliant v. United States,* 297 F.2d 385, 389 (8th Cir.), *cert. denied,* 369 U.S. 871, 82 S.Ct. 1140, 8 L.Ed.2d 275 (1962).

Section 1010 is composed of several operative clauses written in the disjunctive. False statements made in several different contexts can trigger its application. It is therefore important to our decision to determine which clause was invoked.

[1] The indictment alleges that appellants violated the first prohibition mentioned in Section 1010, that of false statements "for the purpose of obtaining a loan or advance of credit . . . with intent that the loan or advance of credit shall be offered to or accepted by [HUD] for insurance . . . ." We conclude that proof of government insurance is not an element of this offense.[2]

The statute makes clear that the prohibited false statement can be made to "any person, partnership, association, or corporation;" an FHA-approved lender is not required. All that must be shown is that a defendant knowingly made a false statement on a document intended to be "offered to or accepted by" HUD for insurance. It is the defendant's intent to mislead the government, no matter how or through whom that deception is accomplished, that is in issue. There is no requirement that any intermediary be covered by existing insurance.

The plain language of Section 1010 is quite different from that of Section 1014. In Section 1014 cases, the focus is quite properly on the party to whom the false statement was made. A person violates that part of Section 1014 relied on by appellants only if a false statement is made to an FDIC-insured bank. But, as we have said, no such requirement exists under Section 1010. The false statement may be made to anyone; it is the intent behind the statement that is in issue.[3]

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[2]Our holding here is narrow and concerns only those charges that involve Section 1010's first prohibition. We intimate no view as to whether proof of federal insurance would be required to sustain convictions for other types of Section 1010 violations.

[3]We note that the jury was instructed in full acordance with the rulings we make today.

B. *Subject Matter Jurisdiction*

[2] The argument that government insurance must be proved to support federal subjectd matter jurisdiction is also flawed. In light of Congress's plenary power to regulate interstate commerce, *see, e.g., Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 195, 6 L.Ed. 23 (1824), it is beyond dispute that Congress may declare it a crime to make false statements with intent to obtain a government-insured loan. The district court accordingly had jurisdiction under 18 U.S.C. § 3231.

C. *The Indictment*

Our conclusion that proof of federal insurance is not an essential element of the offense charged does not end our inquiry, however. The indictment recites allegations that S & R held an insurance contract with the government and that the contract dictated the rights and obligations of S & R and the government in this matter.[4] Appellants argue that the government offered insufficient proof of these allegations, necessitating reversal of their convictions. We reject this contention.

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[4]The indictment charged appellants with conspiracy

> . . . to knowingly and willfully make, pass, utter and publish false statements knowing the same to be false, for the purpose of obtaining a loan and an advance of credit from an insured financial institution and with the intent that such loan and advance of credit would be offered to and accepted by [HUD] for insurance . . . .

Elsewhere, the indictment alleged that S & R held a "contract of insurance under Title I of the National Housing Act and made insured financing available through approved mobile home dealers to purchasers of mobile homes in the State of Nevada."

[3] As our cases have held, an indictment must provide a defendant with a description of the charges aginst him sufficient: (1) to enable him to prepare his defense; (2) to ensure him that he is being prosecuted on the basis of facts presented to the grand jury; (3) to enable him to plead double jeopardy against a later prosecution; and (4) to inform the court of the facts alleged so that it can determine the sufficiency of the charge. *United States v. Bohonus*, 628 F.2d 1167, 1173 (9th Cir.), *cert. denied*, 447 U.S. 928, 100 S.Ct. 3026, 65 L.Ed.2d 1122 (1980); *see also United States v. Christopher*, 700 F.2d 1253, 1257 (9th Cir.), *cert. denied*, 461 U.S. 960, 103 S.Ct. 2436, 77 L.Ed.2d 1321 (1983).

[4, 5] The cases make clear that the government need not prove all facts charged in an indictment; instead, only enough facts to prove the essential elements of the crime must be demonstrated at trial. *United States v. Hughes*, 766 F.2d 875, 879 (5th Cir.1985); *United States v. Archer*, 455 F.2d 193, 194 (10th Cir.), *cert. denied*, 409 U.S. 856, 93 S.Ct. 135, 34 L.Ed.2d 100 (1972). Insofar as the language of an indictment goes beyond alleging elements of the crime, it is mere surplusage that need not be proved. *United States v. Greene*, 497 F.2d 1068, 1086 (7th Cir.1974), *cert. denied*, 420 U.S. 909, 95 S.Ct. 829, 42 L.Ed.2d 839 (1975); *Gawne v. United States*, 409 F.2d 1399, 1403 (9th Cir.1969), *cert. denied*, 397 U.S. 943, 90 S.Ct. 956, 25 L.Ed.2d 123 (1970).

[6] The inclusion of surplusage must not be allowed to prejudice a defendant in the context of his case. *United States v. Aguilar*, 756 F.2d 1418, 1423 (9th Cir.1985). But appellants here make no claim that the indictment failed to inform them fully of the charges against them or that they were otherwise prejudiced by the allegations of government insurance. Nor could they, on these facts.

[7] As we have held, proof of federal insurance is not an essential element of the crimes charged here. To the extent that the indictment included allegations that appellants' false statements were directed to an FHA-approved lender, the language was surplusage that did not have to be proved at trial. Its inclusion was harmless.

II. USE OF WHITE'S CIVIL DEPOSITION

White and Jenkins argue that their convictions should be reversed because the trial court improperly admitted deposition testimony that White gave in a civil action arising out of the same facts. The testimony was damaging because in it White acknowledged that Young American's financing arrangement with S & R constituted "federal fraud."

A. White's Claim

White argues that use of this deposition violated his fifth amendment privilege against self-incrimination where, as here, he did not testify in his own behalf at his criminal trial.

[8-10] This claim is frivolous. The fifth amendment privilege is not ordinarily self-executing and must be affirmatively claimed by a person whenever self-incrimination is threatened. *Minnesota v. Murphy,* 465 U.S. 420, 429, 104 S.Ct. 1136, 1143, 79 L.Ed.2d 409 (1984). An individual may lose the benefit of the privilege inadvertently, without a knowing and intelligent waiver. *Garner v. United Staes,* 424 U.S. 648, 654 n. 9, 96 S.Ct. 1178, 1182 n. 9, 47 L.Ed.2d 370 (1976). White did so when he gave his deposition.

[11] White claims further that his deposition testimony was not voluntary. He argues that it was compelled because he was subpoenaed to appear. This argument is equally meritless. In *Murphy,* the Supreme Court made clear that an obligation to appear and testify truthfully does not constitute compulsion to give incriminating testimony. The privilege may still be asserted at the proceeding and must be to avoid wavier of the privilege. *See Murphy,* 465 U.S. at 427-28, 104 S.Ct. at 1142.

Because White's statements at the deposition were voluntary, they were clearly admissible against him as party admissions under Federal Rule of Evidence 801(d)(2)(A). *See, e.g., United States v. O'Connor,* 737 F.2d 814, 821 (9th Cir.1984), *cert. denied,* ____ U.S. ____, 105 S.Ct. 1198, 84 L.Ed.2d 343 (1985).

B. Jenkins' Claim

[12] Jenkins asserts that the deposition testimony was "Powerfully incriminating" as to him within the meaning of *Bruton v. United States,* 391 U.S. 123, 135, 88 S.Ct. 1620, 1627, 20 L.Ed.2d 476 (1968). Because White did not testify at the trial, Jenkins contends that he was denied his sixth amendment right of confrontation when the deposition testimony was admitted. Examination of White's testimony, however, shows that no portion of it "directly implicated" Jenkins, as required for a successful *Bruton* claim. Jenkins is never mentioned. It is only in the context of the other evidence of guilt presented by the government that the statements tend to implicate Jenkins in any way; even then, the reference to him is oblique. *See United States v. Brooklier,* 685 F.2d 1208, 1218 (9th Cir.1982) (per curiam), *cert. denied,* 459 U.S. 1206, 103 S.Ct. 1194, 75 L.Ed.2d 439 (1982); *see also United States v. Wright,* 742 F.2d 1215, 1223 (9th Cir.1984); *United States v. Bur-*

reson, 643 F.2d 1344, 1349 (9th Cir.), *cert. denied,* 454 U.S. 830 (1981). Because White's testimony did not directly implicate Jenkins, the *Bruton* claim fails.

III. SEVERANCE OF THE TRIALS

White argues that the trial court erred in denying his motion to sever his trial from that of the other defendants. He asserts that, but for the joinder, he could have called codefendant Jenkins, who woud have testified favorably for him. Moreover, White states that he was a minor actor in the scheme and that his conviction resulted from a spillover effected from the evidence against the other defendants[5]. In this court, denial of severance is reviewable under an abuse of discretion standard. *United States v. Harris,* 738 F.2d 1068, 1073 (9th Cir.1984).

[13] When the reason for severance is the need for a codefendant's testimony, defendant must show that he would call the codefendant at a severed trial, that the codefendant would in fact testify, and that the testimony would be favorable to the moving party. *United States v. Seifert,* 648 F.2d 557, 563 (9th Cir.1980); *see also United States v. Mayo,* 646 F.2d 369, 374 (9th Cir.), *cert. denied,* 454 U.S. 1127, 102 S.Ct. 979, 71 L.Ed.2d 115 (1981).

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[5]White also contends that severance was required under *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), because of the government's expected use of Jenkins' grand jury testimony. *See infra* Part IV. Because the testimony might have implicated him and because Jenkins would have been unavailable for cross-examination, White argues that severance was required. At trial, however, the government did not introduce the grand jury testimony. We therefore need not address this claim.

White relies on *Seifert,* but it is distinguishable. In *Seifert,* counsel had proffered a detailed outline of the codefendant's expected testimony, and the trial court had found that the testimony would be favorable to the moving party. It was only in this context that we reversed the district court's denial of the severance motion.

[14] By contrast, White merely makes a bare assertion that Jenkins' testimony would have been favorable. Moreover, his assertion comes despite a statement in his original severance motion that Jenkins' grand jury testimony actually implicated him. White even raised a *Bruton* claim for severance based on the same fear of inculpatory testimony. This case, then, appears to be more like *Mayo,* in which we upheld the denial of a severance motion where the codefendant's testimony would not necessarily have been favorable to the moving party. *Mayo,* 646 F.2d at 374.

[15] White's spillover claim must also fail. As we held in *United States v. Sears,* 663 F.2d 896, 901 (9th Cir.1981), *cert. denied,* 455 U.S. 1027, 102 S.Ct. 1731, 72 L.Ed.2d 148 (1982), a party seeking reversal of a denial of severance carries "the difficult burden of demonstrating clear, manifest or undue prejudice resulting from a joint trial." It is not enough that a "separate trial might offer a defendant a better chance of acquittal, or that the prosecution's case is stronger against a codefendant." White makes no particularized showing of prejudice beyond an assertion, disputed by the government, that he was a minor player in the scheme. Moreover, the trial judge here was careful to give several cautionary and limiting instructions to ensure that the jury could compartmentalize the evidence. Nothing indicates that these admonitions were insufficient. *See*

United States v. Brady, 579 F.2d 1121, 1128 (9th Cir. 1978), *cert. denied,* 439 U.S. 1074, 99 S.Ct. 849, 59 L.Ed.2d 41 (1979).

IV. JENKINS' MOTION TO SUPPRESS HIS GRAND JURY TESTIMONY

Jenkins argues that the trial court erred in denying his motion to suppress his grand jury testimony without an evidentiary hearing[6]. Jenkins argues that, prior to his appearance before the grand jury, he was misled by a letter from the government attorney who prosecuted this case. In the letter, Jenkins was told that the grand jury had no substantial evidence linking him to the commission of a crime and that he was not a putative defendant. A false sense of security created by the letter, Jenkins argues, induced him to testify in a self-incriminating manner. Thus, use of his testimony would have violated his fifth amendment privilege against self-incrimination and the due process requirement of fundamental fairness. Jenkins apparently objects to both the denial of his suppression motion and the denial of an evidentiary hearing.

[16] Motions to suppress statements on fifth amendment voluntariness grounds deserve a fair hearing and a reliable determination. *Jackson v. Denno,* 378 U.S. 368,

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[6]Although the district court denied the suppression motion, the government decided not to use the testimony at trial. Jenkins contends that the denial of the motion to suppress caused him to forego testifying on his own behalf. Because the merits of the motion to suppress are clear, we proceed to address them and assume without deciding that they are properly raised here. *See Luce v. United States,* 469 U.S. 38, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984) (defendant who does not tstify not entitled to review denial of motion to suppress prior conviction, which, had he testified, might have been used for impeachment).

391, 84 S.Ct. 1774, 1788, 12 L.Ed.2d 908 (1964). But this requirement applies only if substantial facts are in dispute. *See id.* The magistrate who initially considered the motion to suppress found that there were no factual disputes, and this finding is wholly supported.

[17] Jenkins' real complaint is that the suppression motion was denied. We find the denial proper. Jenkins was under subpoena to testify before the grand jury. While the government attorney's letter to him did indicate that he was not then a putative defendant, the letter also clearly stated that he was "a subject of a federal grand jury investigation." Moreover, the letter said that he could become a "target" of the investigation at any time. Most important, the letter detailed Jenkins' rights to refuse to answer incriminating questions and to retain counsel. The letter stated, "Anything you do say may be used against you by the Grand Jury or in a subsequent legal proceeding."

As we have already pointed out, appearance before a grand jury or other proceeding pursuant to subpoena does not constitute compulsion within the meaning of the fifth amendment. Because Jenkins failed to assert his fifth amendment privilege during the grand jury proceedings, he is deemed to have waived his rights. *Minnesota v. Murphy,* 465 U.S. 420, 427-29, 104 S.Ct. 1136, 1142-43, 79 L.Ed.2d 409 (1984); *United States v. Swacker,* 628 F.2d 1250, 1252-53 (9th Cir.1980).

V. AUTHENTICATION OF PROCK'S SIGNATURE

[18] Prock contends that the district court erred in denying his post-trial motion for acquittal. The motion was based in part on the ground that jurors were permitted to

make handwriting comparisons to authenticate Prock's signature on various FHA loan documents. Prock claims that, because the handwriting exemplars given to the jury were check requests containing only the words "O.k. Ross," the jury did not have a complete handwriting sample to compare with the FHA documents.

This claim is frivolous. Under *United States v. Woodson,* 526 F.2d 550, 551 (9th Cir.1975) (per curiam), a jury may make handwriting comparisons except under extreme or unusual circumstances. Indeed, *Woodson* makes clear that the jury is obliged to make such comparisons and draw conclusions from them.

Prock contends that use of an incomplete signature exemplar constitutes an "extreme or unusual circumstance." But he cites, and we can find, no case supporting this proposition. "Extreme or unusual circumstances" involve situations where the authenticity of the handwriting is the primary issue in the case, as where forgery is alleged. Our independent examination of the exemplars convinces us that a reasonable jury could well conclude that the same person signed the check requests and the loan applications.

Moreover, Prock offered no evidence to rebut the authenticity of the signatures here. As the Third Circuit had held, effective rebuttal lessens the danger that jurors will assign improper weight to their comparisons of handwriting samples. *United States v. Clifford,* 704 F.2d 86, 91 (3rd Cir.1983).

VI. EVIDENCE OF JENKINS' PRIOR BAD ACTS

[19] Jenkins argues that his conviction should be reversed because the trial court improperly permitted government witness Judith Rouse to testify to some ir-

regularities in a conventional loan Jenkins arranged on a mobile home she purchased from Young American. The acts in question occurred more than a year before the alleged conspiracy, and Jenkins argued at trial that the evidence was irrelevant and prejudicial. The trial court admitted the evidence under Federal Rule of Evidence 404(b) and agreed to give a limiting instruction. Jenkins now argues that admissibility under Rule 404(b) was improper, that no jury instruction was given, and that the evidence was also inadmissible under Federal Rule of Evidence 403.

The evidence was properly admitted under Rule 404(b). The fact that Jenkins used fraudulent means to secure conventional loans is probative on issues of intent, knowledge, good fatith and absence of mistake in dealing with the FHA transactions. *See, e.g., United States v. Walls,* 577 F.2d 690, 696 (9th Cir.), *cert. denied,* 439 U.S. 893, 99 S.Ct. 251, 58 L.Ed.2d 239 (1978); *United States v. McDonald,* 576 F.2d 1350, 1356 (9th Cir.), *cert. denied,* 439 U.S. 830, 99 S.Ct. 105, 58 L.Ed.2d 124 (1978).